IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

LINDA BERGEY and JAMES R. BERGEY, SR.,

Plaintiffs,

vs. **NO.CIV-05-0536MCA/WPL**

BOY SCOUTS OF AMERICA
d/b/a PHILMONT SCOUT RANCH BSA,

Defendant.

RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Defendant has moved for summary judgment, under F.R.Civ.P. 56, asserting that Linda Bergey's injuries were solely the result of the unpredictable behavior of a pack horse named Spinner and that under the New Mexico Equine Liability Act, NMSA 1978, § 42-13-4, et seq., the Defendant is protected from liability resulting from such behavior. However, the Defendant's assertion ignores first, the policy of the Equine Liability Act under which equine operators are accountable in tort for injuries due to their own negligence; and second, all the material facts from which the jury may reasonably conclude that Linda Bergey's injuries resulted from the Defendant's negligence.

RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS

1. The Plaintiff admits the following numbered statements of fact recited in the Defendant's Memorandum in Support of Motion for Summary Judgment: 1-9, 11, 14-17, 20-22, 24-25, 27, 29-34, 30-34.

31

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2. With respect to Statement 10, the Plaintiff denies that Nancy Burch had previously sold horses to Philmont. (Deposition of Ben Vargas, P.10, L.1-7) The Plaintiff denies that Spinner was ten years old; Spinner's age was estimated to be twelve or older. (Deposition of Robert Ricklefs, P.46, L-25 to P.47, L-5) The Plaintiff admits that Nancy Burch did not report any "problems" about Spinner when she sold him to Philmont (Deposition of Ben Vargas, P.15, L.25 -P.16, L.8), but denies the Defendant's implication that any specific problems with Spinner were referred to.

3. The Plaintiff admits the allegations of Statement 12, except that the record does not reflect the date or dates on which Spinner had been outfitted with packs prior to July 7, 2002. (Deposition of Eric Perry, P. 46, L. 10 - P.47, L7)

4. With respect to the allegations of Statement 13, the Plaintiff admits that on July 7, 2002, Spinner was outfitted as a pack horse prior to being led into the arena where the injury to Linda Bergey occurred. (Deposition of Eric Perry, P.58, L. 9-15) The Plaintiff denies that the Defendant's citation to the record makes any reference to the facts alleged.

5. With respect to Statement 18, the Plaintiff denies that the testimony is disputed; the fact that Sara McGatha Shaddix did not see the incident does not create a factual dispute. The Plaintiff admits the remaining allegations of Statement 18.

6. With respect to the allegations of Statement 19, the citation supporting the allegation contains no reference to the facts alleged. The Plaintiff admits that Sara McGatha Shaddix believes Spinner was in the arena when the participants entered. (Deposition of Sara McGatha Shaddix, P.58, L.14 -23)

7. With respect to Statement 23, the Plaintiff denies that Eric Perry had previously

ridden Spinner several times; Perry testified only that he did not remember how many times he rode Spinner. (Deposition of Eric Perry, P. 45, L. 3-6) The Plaintiff admits the remaining allegations of Statement 23.

8. With respect to Statement 26, Plaintiff admits that in the report cited by the Defendants, Hugh Ley stated his opinion that under the circumstances, staffing for the activity in which Linda Bergey was injured was inadequate (Deposition of Hugh Ley, Ex. C, p.3); and that the Defendant was negligent in attempting to train Spinner to be a pack horse during the Cavalcade (Deposition of Hugh Ley, Ex. C, p.3). The Plaintiff denies the remaining allegations of Statement 26.

9. With respect to Statement 28, the Plaintiff admits that the Defendant provides two wranglers on rides of up to 15 participants and three wranglers on rides of over 15 participants. (Deposition of Ben Vargas, P. 22, L. 15-19) The Plaintiff admits that the Certified Horseman's Association requires two wranglers on all rides (Deposition of Hugh Ley, P. 36, L.25), and/or two staff people per ten riders. (Deposition of Hugh Ley, P.94, L. 15 - P.95, L.15) The Plaintiff admits that his stables Hugh Ley typically provides one wrangler for a group of three or four people on a horse trip. (Deposition of Hugh Ley, P. 36, L. 5-15) The Plaintiff denies the remaining allegations of Statement 28.

10. With respect to the allegations of Statement 35, the Plaintiff admits that the fact that Spinner's bolting would not, in itself, mean that the wranglers caused Spinner to bolt. The Plaintiff denies the remaining allegations of Statement 35.

11. The Plaintiff denies the allegations of Statement 36.

PLAINTIFF'S STATEMENT OF MATERIAL FACTS

12. Linda Bergey, a novice horseback rider, enrolled as a participant in a six day horseback ride known as a Cavalcade, at Philmont Scout Ranch, BSA operated by the Boy Scouts of America. (Deposition of Linda Bergey, P. 38, L. 3-25; Deposition of Sara McGatha Shaddix, P. 33, L. 13-20; Complaint, 2)

13. Linda Bergey was seriously injured on July 7, 2002, during preparations for the Cavalcade. (Complaint, 28) The participants were gathered at Philmont's Cattle Headquarters, where they were matched with horses by members of the Philmont staff. (Deposition of Sara McGatha Shaddix, P.44, L.18 - P.45, L. 14) They then moved to a corral (Deposition of Hugh Ley, Ex. K, area "A"), where the were instructed in the basics of saddling and caring for their horses. (Deposition of Sara McGatha Shaddix, P.43, L. 12-24) The participants then moved to the roping arena (Deposition of Hugh Ley, Ex. K), mounted their horses and rode one behind the other in a circle in an arena.

14. While Linda Bergey was riding in the circle, a pack horse named Spinner broke loose from wrangler Eric Perry, who was attempting to lead it. Spinner charged wildly at the horses in the circle, colliding into Ms. Bergey's horse, and causing her horse to fall on her. (Deposition of Eric Perry, P.73, L.5 - P.74, L.11; Deposition of James R. Bergey, Jr. P.58, L. 5 - P.67, L.14)

15. Philmont purchased Spinner in April, 2002. (Deposition of Ben Vargas, P.9, L.10-14) He was thought to be an experienced riding horse. (Deposition of Ben Vargas, P.15, L.5-24)

16. Spinner caused trouble from the start. This was documented in written reports.

(Deposition of Ben Vargas, Ex. A) He was "antsy," walked too fast for a trail horse, pranced and walked out of line, trying to get ahead of the horse in front of him. (Deposition of Ben Vargas, P.15, L. 5-24) He was unsuitable both for novice riders and wranglers to ride, (Deposition of Ben Vargas, P.15, L.25 - P.17, L.22) even after the Philmont staff made efforts over a period of weeks to train Spinner as a riding horse. (Deposition of Ben Vargas, P.19, L.1-21; P.23, L.1 - P .26, L.19)

17. The superintendent of Philmont's horse operations knew that a horse that will not stay in line "raises a flag" and can be dangerous. (Deposition of Robert Ricklefs, P.5, L. 20-23; P.46, L. 3-24) Wranglers who rode Spinner did not feel comfortable using Spinner as a riding horse. (Deposition of Robert Ricklefs, P.48, L.6 - P.49, L.25)

18. As a result of Spinner's unsuitability as a riding horse, the Philmont staff, in late June or early July, decided to train him a pack horse. (Deposition of Ben Vargas, P.26, L.3 - P.27, L.24)

19. Prior to July 7, 2002, Spinner had been outfitted with packs two or three times. (Deposition of Ben Vargas, P.27, L.8-24) At the time of the July 7 Cavalcade, Spinner was still a "rookie" pack horse in training. (Deposition of Ben Vargas, P.28, L.5; P.30, L.1-18)

20. Two Philmont employees were assigned to the Cavalcade on July 7, 2002, the horseman Sara McGatha Shaddix and the wrangler Eric Perry. (Deposition of Eric Perry, P.41, L. 14-18)

21. Spinner was to be used as a pack horse during the Cavalcade which was to begin on July 7, 2002. (Deposition of Eric Perry, P.49, L.20-25)

22. Someone was heard to say to be careful around Spinner. (Deposition of Betsy

Bergey, P.25, L.9-18)

23. On July 7, Spinner was packed as a pack horse sometime prior to the arrival of the Cavalcade participants Cavalcade. (Deposition of Eric Perry, P.58, L.9-18)

24. While the Cavalcade participants were saddling their horses, a wrangler brought Spinner into the west gate of the corral where the participants were saddling their horses. (Deposition of Hugh Ley, Exhibit D-1) Steven Bergey's horse was tied next to the west gate of the corral. As soon as Steven Bergey's horse saw Spinner "it did not want anything to do with that horse." (Deposition of Steven Bergey, P.28, L.1-8) Steven Bergey's horse "stood up and almost sat down on its back legs." (Deposition of Steven Bergey, P.28, L.1-8) Spinner was "kind of bucking and . . . kind of like hitting its head up and down, pulling and straining to get the rope freely from the . . . [wrangler]." (Deposition of James R. Bergey, Jr., P.36, L.20-23)

25. After this incident Sara said that Spinner was a green horse, that this was his first trip out and that they had to try him out because they didn't have any other horses. (Deposition of Betsy Bergey, P.57, L. 20 - P.58, L.8; Deposition of James R. Bergey, Jr., P.37, L.6 - P.38, L.6)

26. Sara told the wrangler to take Spinner to the other end of the corral. The wrangler led Spinner outside the corral and around to the east gate of the corral. (Deposition of Hugh Ley, Exhibit D-1) When he re-entered the corral at the other end, Spinner broke loose from the wrangler who was leading him and charged at a line of four or five horses who were tied there. The wranglers were yelling and screaming at everyone to get away as the horses were driven against the fence by the charging Spinner. The wranglers yelled at a child who had climbed the corral fence to get away from the fence or she might be crushed. (Deposition of James R.

Bergey, Jr., P. 41. L. 23 - P.47, L15; Deposition of James R. Bergey, Jr., Exhibit D, p. 2; Deposition of Steven Bergey, P.27, L.1 - P.30, L.21)

27. After he was brought under control Spinner was led from the corral to the roping arena, where he was tied to a post. (Deposition of James R. Bergey, Jr., P.47, L.19 - P.48, L.7)

28. Witnessing these events caused James R. Bergey to believe that Spinner was unsafe for the Cavalcade. (Deposition of James R. Bergey, Jr., P.48, L.10 - P.49, L.15; Deposition of James R. Bergey, Jr., Exhibit D, p. 2)

29. The participants were instructed to lead their horses into the arena where Spinner was tied. As they entered, the horses seemed nervous and whinnied loudly. (Deposition of James R. Bergey, Jr., P.48, L.10 - P.49, L.15)

30. A wrangler put a slicker over Spinner's head and led him around the corral, in an apparent attempt to calm or desensitize him. (Deposition of James R. Bergey, Jr., P.53, L.11 - P.54, L.14; Deposition of Eric Perry, P.64, L.10-19; Deposition of Sara McGatha Shaddix, P.73, L.17 - P.74, L.23; Deposition of Hugh Ley, P.83, L.18 - P.85, L.22)

31. The Cavalcade participants mounted their horses and rode in a circle around the arena. (Deposition of James R. Bergey, Jr., P.56, L.5 - P.58, L.7; Deposition of Sara McGatha Shaddix, P.59, L.6-10)

32. While Sara was leading the participants in a circle, Eric was occupied with Spinner. (Deposition of Eric Perry, P.60, L.6 - P.61, L.23). Eric untied Spinner, led him to his own horse and mounted it. (Deposition of Eric Perry, P.60, L.18-19) Eric was leading Spinner in a circle by a lead rope when Spinner broke loose. (Deposition of Eric Perry, P.73, L. 11-25)

33. Before Eric went to get Spinner, the other wranglers had joked about who was

going to handle Spinner, who had been giving them trouble. (Deposition of James R. Bergey, Jr., P.59, L. 13 - P.60, L.25)

34. After breaking loose from Eric, Spinner charged at the other horses, running full speed with his head low and extended, his ears back, and his mouth open and showing teeth. The yellow slicker on Spinner was flapping as he ran. (Deposition of James R. Bergey, Jr., P.63, L.1 - P.64, L.20)

35. Either Spinner or his pack struck Linda Bergey's horse, which bucked, lost its balance and rolled to the right, driving Linda Bergey into the ground. (Deposition of Steven J. Bergey, P. 45, L. 20 - P. 46, L. 7; James R. Bergey, Jr. P.61, L.23 - P.67, L. 14; Deposition of James R. Bergey, Jr., Exhibit B)

36. It was not appropriate to use the Cavalcade as a training exercise for Spinner. (Deposition of Hugh Ley, Ex. C, p. 3, ¶2)

37. The fact that Eric was occupied with Spinner while Sara was leading the participants around the arena effectively reduced staffing for the fifteen participants to below a proper level. (Deposition of Hugh Ley, Ex. C, p. 3, ¶3)

38. Spinner's slicker flapping when he broke loose indicates that he was improperly packed, and the loose slicker would have the effect of scaring Spinner more after he had initially spooked. (Deposition of Hugh Ley, Ex. C, p. 4, ¶1)

39. The difficulty the defendant's employees had in using Spinner as a riding horse should have caused them to realize Spinner's potential for detrimental behavior. (Deposition of Hugh Ley, P.61, L. 5 - P. 62, L.9)

40. In the two July 7th incidents (James R. Bergey deposition, Exhibit "A") in the

saddling corral. (Area "A" marked in Exhibit "K" to Huge Lay deposition). prior to Linda Bergey's injury in the roping arena, Spinner created dangerous situations, which put the Defendant's staff on notice that Spinner posed a foreseeable risk of harm to participants. At that point he should be removed from the Cavalcade. (Deposition of Hugh Ley, Ex. C, p. 3, ¶3) The first incident was when Spinner was led into the corral the first time and spooked Steven Bergey's horse. (Deposition of Hugh Ley, P.61, L.15-19) The second incident was when Spinner caused a dangerous commotion among several other horses when he was led into the corral a second time. (Deposition of Hugh Ley, P.61, L.20 - P.62, L.24)

ARGUMENT

Summary judgment is proper only when there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F. R. Civ. P. 56(c). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

Under the New Mexico Equine Liability Act an injured person may recover tort damages from the operator an equine activity when the damages were proximately caused by the operator's negligent acts or omissions. NMSA 1978 § 42-13-4(B). In this case there are genuine issues of material fact from which a jury could reasonably conclude, or reasonable minds could differ, that the Defendant's negligence in the management of the Cavalcade and the handling of the horse Spinner created a situation that left uncontrolled proximately caused the injury to Linda Bergey.

The Equine Liability Act, NMSA 1978 § 42-13-1, *et seq.* (1993), protects operators of equine activities from liability for injury caused "as a result of the behavior of equine animals while engaged in any equine activities." NMSA 1978 § 42-13-4(A) (1993). "Behavior of equine animals" is defined as "the propensity of an equine animal to kick, bite, shy, buck, stumble, bolt, rear, trample, be unpredictable or collide with other animals, objects or persons." NMSA 1978 § 42-13-3(C) (1995). The protection against liability provided by the Act is not absolute, however. The Act provides six exceptions under which an operator may be subject to liability. Five of those exceptions are listed in § 42-13-4(C). Those exceptions subject an operator to liability for knowingly or negligently providing faulty equipment, § 42-13-4(C)(1); for failure to assess rider ability or manage an equine according to a rider's representation of ability, § 42-13-4(C)(2); for dangerous conditions on the land where equine activity takes place, § 42-13-4(C)(3); for conscious or reckless disregard of rider safety, § 42-13-4(C)(4); and for intentionally causing injury, § 42-13-4(C)(5).

The Defendant is correct in asserting that the Plaintiff does not allege that any of the exceptions of § 42-13-4(C) apply in this case. There is a sixth exception, however, contained in § 42-13-4(B), which the Defendant's argument mentions in passing, but does not address. Section 42-13-4(B) provides:

> No person, corporation or partnership shall make any claim against, maintain any action against or recover from a rider, operator, owner, trainer or promoter for injury, loss or damage resulting from equine behavior unless the acts or omissions of the rider, owner, operator, trainer or promoter constitute negligence.

This section, while protecting an operator from liability for injury caused uniquely by the unpredictable behavior of an equine, does not extend that protection to the operator's own negligent acts. The negligence exception of § 42-13-4(B) is not limited in any way to the five circumstances enumerated in § 42-13-4(C). Rather, it is a general exception to the immunity for the negligence of the operator.

In *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, 134 N.M. 341, 76 P.3d 1098, the court considered the validity of a written release of liability for injuries caused by the negligence of a horse trail ride operator. The court concluded that the release was unenforceable because it violated the public policy expressed in the Equine Liability Act that operators of equine activities be liable for their negligent acts, as well as other public policy considerations. The court stated:

> [T]he Equine Liability Act very clearly expresses a policy that equine operators should not be held liable for equine behavior. Section 42-13-4(A), (B). That is not disputed here. Subsection B contains the qualifier, however, "unless the acts or omissions of the ... operator ... constitute negligence." Running Elk takes the position that this phrase only serves to limit the definition of conduct for which it cannot be held liable. We agree that this phrase does serve that purpose. We also believe, however, that the legislative intent goes further than that to express a policy that equine operators should be accountable for their own negligence.
>
> *Id.*, 2003-NMSC-024, ¶ 42, 134 N.M. at 354, 76 P.3d at 1111.

The court further emphasized that "the Act expresses in general terms a public policy of our Legislature that equine operators should be accountable for injuries due to their own fault." *Id.*, 2003-NMSC-024, ¶ 44, 134 N.M. at 354, 76 P.3d at 1111.

The fact that Spinner's actions led to Linda Bergey's injuries is not alone determinative of the Defendant's liability under the Act. The question not addressed by the Defendant's motion is whether there is evidence that Spinner's actions caused Linda Bergey's injuries as a result of the Defendant's failure to exercise reasonable care in training and managing Spinner. The Plaintiff makes no claim that the Defendant is liable for the injurious equine actions of Spinner per se. Rather, the claim is that under the circumstances, the actions of the Defendants created a foreseeable risk that Spinner would cause injury, and that the Defendants did not take reasonable steps to mitigate that risk.

In characterizing the injury to Linda Bergey as being caused solely by equine behavior, the Defendant ignores all the evidence of its own negligence. From the time the Defendant purchased Spinner two months before Ms. Bergey was injured, the horse caused trouble. He was judged unsuitable to be ridden by either novice guests or experienced wranglers. Robert Ricklefs, the ranch superintendent, recognized such behavior as Spinner exhibited to be dangerous. Spinner was relegated to being used as a pack horse. He had received only limited training as a pack horse before the Cavalcade. He was still in training on the day the Cavalcade was to begin. On that day, July 7, 2002, Spinner repeatedly acted dangerously while confined with a group of novice riders. The Defendant's employees were on notice of Spinner's dangerous behavior, but failed to take reasonable measures to protect the participants from the danger he posed. After a first dangerous incident, in which Spinner caused Steven Bergey's horse to spook and sit back, a wrangler moved him around to enter the other side of the corral. While reentering the corral Spinner caused a second dangerous commotion by charging at several horses tied to the corral fence. A jury could conclude that after these two dangerous incidents, the first immediately followed by the second, it was unreasonable and negligent to allow Spinner to continue in the Cavalcade. It was not sufficient to attempt a half-measure, such as placing a slicker over Spinner's head. Spinner's behavior had riled the other horses, and they were edgy. That had been demonstrated to the Defendant's employees. Spinner should have been removed from the Cavalcade. It was negligent of the Defendant's employees not to do so. Their negligence was compounded by their failure to maintain proper control over Spinner and by their failure to properly secure Spinner's slicker, which, flapping in the breeze when Spinner again broke loose and charged at the circle of riders in the middle of the arena, was a likely cause for Spinner to become wilder and more uncontrollable.

These are genuine material facts tending to prove the Defendant's negligence. They show that Spinner was negligently utilized and packed on the day of the Cavalcade. They show that the Defendant's experience in training Spinner, coupled with his unstable behavior on the day of the Cavalcade, placed the Defendant's employees on notice that Spinner was a dangerous horse; that he posed a specific, foreseeable danger to the Cavalcade participants. They show that the Defendant's employees were negligent in not removing Spinner from the Cavalcade before he caused grievous injuries to Linda Bergey.

CONCLUSION

A reasonable jury could return a verdict finding that the Defendant's employees were negligent in not removing Spinner from the Cavalcade before he broke loose and caused the Plaintiff's injuries. There is also evidence from which the jury could conclude that the Defendant's employees were negligent in not properly securing the slicker to Spinner's pack, further aggravating Spinner's dangerous actions. The Defendant's motion for summary judgment should be accordingly denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2006, I caused a copy of the Plaintiffs' Response to Defendant's Motion for Summary Judgment together with this Certificate of Service to be served, by first class mail, postage prepaid, on the Defendant's counsel of record , Alfred L. Green, Jr., Esq., Butt, Thornton and Baehr, P.C., P.O. Box 3170, Albuquerque, NM 87190-3170.

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THE EXHIBITS ATTACHED TO THIS PLEADING ARE TOO VOLUMINOUS TO SCAN. SAID EXHIBITS ARE ATTACHED TO THE ORIGINAL PLEADING IN THE CASE FILE WHICH IS LOCATED IN THE RECORDS DEPARTMENT, U.S. DISTRICT COURT CLERK'S OFFICE.